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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:

BED BATH & BEYOND INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-13359 (VFP)

**OBJECTION TO ASSUMPTION OF DEBTORS'
UNEXPIRED LEASE WITH CPT ARLINGTON HIGHLANDS 1, LP**

¹ The last four digits of Debtor Bed Bath & Beyond Inc.'s tax identification number are 0488. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' claims and noticing agent at <https://restructuring.ra.kroll.com/bbby>. The location of Debtor Bed Bath & Beyond Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 650 Liberty Avenue, Union, New Jersey 07083

CPT Arlington Highlands 1, LP, as successor-in-interest to WIL-CPT Arlington Highlands I, LP, as successor-in-interest to Arlington Highlands, Ltd. ("CPT Arlington") files this *Objection to Debtors' Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* (the "Objection") and in support thereof, respectfully states as follows:

BACKGROUND

1. On April 23, 2023 (the "Petition Date"), the above-captioned debtors (collectively, the "Debtors") filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are operating as debtors in possession pursuant to Bankruptcy Code §§ 1107 and 1108.
2. Prior to the Petition Date, Debtor Bed Bath & Beyond Inc., as tenant (the "Tenant"), and Arlington Highlands, Ltd., as landlord, entered into that certain *Lease Agreement* dated December 2, 2005 (the "Original Lease"), as subsequently modified and/or amended including by that certain *First Amendment to Lease Agreement* dated January 26, 2006 by and between the Tenant, and Arlington Highlands, Ltd., as landlord (the "First Amendment"), *Second Amendment to Lease Agreement* dated January 31, 2007 by and between the Tenant, and Arlington Highlands, Ltd., as landlord (the "Second Amendment"), *Third Amendment to Lease Agreement* dated March 25, 2008 by and between the Tenant, and Arlington Highlands, Ltd., as landlord (the "Third Amendment"), and *Fourth Amendment to Lease Agreement* dated January 31, 2023 by and between the Tenant, and CPT Arlington, as landlord (the "Fourth Amendment") pursuant to which Tenant leased certain real property for premises in the Arlington Highlands Shopping Center, Arlington, Texas having an address located at 400 Retail Connection Way, Arlington,

Texas 76018. The Original Lease and each subsequent amendment thereto (hereinafter collectively, the "Lease")² are incorporated herein by reference.

3. On April 19, 2023 the Court entered its *Order (I) Approving the Auction and Bidding Procedures, (II) Approving Stalking Horse Bid Protections, (III) Scheduling Bid Deadlines and an Auction, (IV) Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief*[Dkt. No. 92] (the "**Bid Procedures Order**"). Pursuant to that Order, the Debtors filed their *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Dkt No. 714] (the "**Cure Notice**"), which sets forth certain executory contracts and unexpired leases that may be assumed and assigned by the Debtors in connection with a sale of the Debtors' assets on Exhibit A of the Cure Notice and the amounts needed to cure any defaults in connection with any such assumption and assignment, pursuant to Bankruptcy Code § 365 (the "**Cure Amount**").

4. Exhibit A of the Cure Notice lists Tenant's Lease with CPT Arlington as a lease subject to assumption with a proposed Cure Amount of \$172,874.26. *See CURE NOTICE*, p. 44. However, as of the date of this Objection, the actual Cure Amount for the Lease is **\$181,223.32**, plus attorneys' fees and the reimbursement of costs incurred by CPT Arlington in an amount not yet determined (the "**Actual Cure Amount**"). Attached hereto as **Exhibit A**, and incorporated herein by reference, is an Aging Report showing the unpaid charges and expenses comprising the Actual Cure Amount (the "**Aging Report**").

OBJECTION TO ASSUMPTION OF LEASE

5. CPT Arlington hereby objects to the assumption of the Lease to the extent that: (i) the Actual Cure Amount is not paid in full in connection with such assumption; (ii) CPT is not

² The Lease documents are available upon request to CPT Arlington's counsel.

provided with adequate assurance of future performance under the Lease; or (iii) such assumption fails to otherwise comply with Bankruptcy Code § 365.

ARGUMENTS AND AUTHORITIES

6. Section 365 of the Bankruptcy Code allows a debtor-in-possession to assume or reject executory contracts and unexpired leases. 11 U.S.C. § 365(a). Assumption of an executory contract or unexpired lease encumbers the debtor with certain obligations, namely that the counter-party be made whole. *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("Section 365 'allows a debtor to continue in a beneficial contract provided, however, that the other party is made whole at the time of the debtor's assumption of said contract.'"); *see also* 11 U.S.C. § 365(b).

7. Section 365(b)(1) provides in relevant part that:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1). Assumption of an executory contract or unexpired lease requires curing all defaults thereunder. 11 U.S.C. § 365(b); *National Gypsum*, 208 F.3d at 506. A debtor that elects

to assume an executory contract or unexpired lease under § 365 must assume it in its entirety, *cum onere*—taking on both the obligations and benefits of the contract. *Id.* (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984)).

8. Tenant has occupied the Lease premises at all times since execution of the Original Lease, including all times since the Petition Date. As shown by the Aging Report, Tenant is in monetary default under the Lease in an amount of at least **\$181,223.32**—*i.e.*, the Actual Cure Amount—which constitutes "actual pecuniary loss[es]" of CPT Arlington under the Lease. *See* 11 U.S.C. § 365(b)(1)(B). Pursuant to § 365(b), the Lease cannot be assumed unless the Actual Cure Amount (and any other amounts then-due but not paid including reasonable attorneys' fees and costs incurred by CPT Arlington) are promptly paid to CPT Arlington in connection with such assumption. 11 U.S.C. § 365(b)(1)(A)-(B). Furthermore, assumption of the Lease requires that CPT Arlington be provided with adequate assurance of future performance under all provisions of the Lease. 11 U.S.C. § 365(b)(1)(C).

RESERVATION OF RIGHTS

9. CPT Arlington reserves its right to assert additional objections related to the assumption or assignment of its Lease, including without limitation objections related to adequate assurance of future performance under Bankruptcy Code § 365, or to otherwise amend this Objection for any reason.

PRAYER

WHEREFORE, CPT Arlington respectfully requests that the Court (a) sustain this Objection; (b) require that any order authorizing the Debtors' assumption of the Lease affirmatively require (i) payment of the Actual Cure Amount and all other amounts due under the Lease and (ii)

adequate assurance of future performance in accordance with Bankruptcy Code § 365; and (c) grant CPT Arlington such other and further relief as is just and proper.

Dated: June 26, 2023
New York, NY

LOWENSTEIN SANDLER LLP

/s/ Eric Chafetz

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Exhibit A

Aging Detail

DB Caption: Fairbourne LIVE - 02/02/16 Property: .ah Tenant: t0000082 Status: Current, Past, Future Age As Of: 06/30/2023
Post To: 06/2023

Property	Customer	Lease	Status	Tran#	Charge Code	Date	Month	Current Owed	0-30 Owed	31-60 Owed	61-90 Owed	Over 90 Owed	Pre-payments	Total Owed
Arlington Highlands (410)														
Bed Bath & Beyond #129 (t0000082)														
410	Bed Bath & Beyond #129	Current	C-179172	estcam		02/01/2023	02/2023	2,186.75	0.00	0.00	0.00	2,186.75	0.00	2,186.75
410	Bed Bath & Beyond #129	Current	R-55289	Prepay		02/15/2023	02/2023	0.00	0.00	0.00	0.00	0.00	-42.13	-42.13
410	Bed Bath & Beyond #129	Current	C-179744	estcam		03/01/2023	03/2023	5,879.83	0.00	0.00	0.00	5,879.83	0.00	5,879.83
410	Bed Bath & Beyond #129	Current	C-182810	recovtax		04/01/2023	04/2023	-6,841.30	0.00	0.00	-6,841.30	0.00	0.00	-6,841.30
410	Bed Bath & Beyond #129	Current	C-182935	recovtax		04/01/2023	04/2023	-5,600.61	0.00	0.00	-5,600.61	0.00	0.00	-5,600.61
410	Bed Bath & Beyond #129	Current	C-183028	recovcam		04/01/2023	04/2023	2,498.05	0.00	0.00	2,498.05	0.00	0.00	2,498.05
410	Bed Bath & Beyond #129	Current	C-183029	recovtax		04/01/2023	04/2023	169,996.99	0.00	0.00	169,996.99	0.00	0.00	169,996.99
410	Bed Bath & Beyond #129	Current	C-184662	estcam		04/01/2023	04/2023	164.56	0.00	0.00	164.56	0.00	0.00	164.56
410	Bed Bath & Beyond #129	Current	C-186222	ww		04/01/2023	04/2023	277.34	0.00	0.00	277.34	0.00	0.00	277.34
410	Bed Bath & Beyond #129	Current	C-186290	ww		04/01/2023	04/2023	48.40	0.00	0.00	48.40	0.00	0.00	48.40
410	Bed Bath & Beyond #129	Current	C-186486	ww		04/01/2023	04/2023	53.48	0.00	0.00	53.48	0.00	0.00	53.48
410	Bed Bath & Beyond #129	Current	C-189020	estcam		05/01/2023	05/2023	5,879.83	0.00	5,879.83	0.00	0.00	0.00	5,879.83
410	Bed Bath & Beyond #129	Current	C-189021	rentret		05/01/2023	05/2023	31,250.00	0.00	31,250.00	0.00	0.00	0.00	31,250.00
410	Bed Bath & Beyond #129	Current	C-190117	ww		05/01/2023	05/2023	49.69	0.00	49.69	0.00	0.00	0.00	49.69
410	Bed Bath & Beyond #129	Current	R-57894	Prepay		05/02/2023	05/2023	0.00	0.00	0.00	0.00	0.00	-24,605.64	-24,605.64
410	Bed Bath & Beyond #129	Current	C-193816	ww		06/01/2023	06/2023	70.21	70.21	0.00	0.00	0.00	0.00	70.21
410	Bed Bath & Beyond #129	Current	R-59265	Prepay		06/13/2023	06/2023	0.00	0.00	0.00	0.00	0.00	-42.13	-42.13
Bed Bath & Beyond #129								205,913.22	70.21	37,179.52	160,596.91	8,066.58	-24,689.90	181,223.32
410								205,913.22	70.21	37,179.52	160,596.91	8,066.58	-24,689.90	181,223.32
Grand Total								205,913.22	70.21	37,179.52	160,596.91	8,066.58	-24,689.90	181,223.32

UserId : abowman@fairbourne.com Date : 6/21/2023 Time : 3:53 PM